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IN THE

Supreme Court of the United States

October Term, 1958

No. 987

FAR WEST ENGINEERING COMPANY, INC., a corporation,
Petitioner,

vs.

ALBERT S. CRAIG, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

Opinions Below.

The original findings of fact and conclusions of law of the District Court and the judgments thereon were filed and entered March 24, 1958. The opinion of the Court of Appeals is reported at 265 F. 2d 251.

Jurisdiction.

The judgment of the Court of Appeals was entered on April 7, 1959 (Pet. App. 20). The petition for a writ of certiorari was filed on June 8, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented.

1. Whether employees preparing draftings and designs for use outside the State in the manufacture of aircraft, missile and electronic test equipment which is to be shipped in interstate commerce are "engaged in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

2. Whether the exemption in section 13(a)(1) of the Fair Labor Standards Act, for employees "employed in a bona fide executive [or professional] capacity * * * (as such terms are defined and delimited by regulations of the Administrator), "can apply to employees paid on an hourly basis, although the Regulations issued under this section require that such employees be compensated "on a salary or fee basis."

3. Whether the conflicting testimony on the trial established a guaranteed compensation agreement exempting petitioner from the Act's overtime requirements with respect to these respondents.

4. Whether an employer can escape his obligations under the Fair Labor Standards Act by a good faith belief that he is not subject to its provisions.

5. Whether the District Court abused its discretion in refusing to dismiss the cases of two employees for failure to comply with certain pretrial discovery procedures.

Statute Involved.

The statute involved is the Fair Labor Standards Act of 1938, as amended, 52 Stat. 1060, 63 Stat. 910, 29 U.S.C. 201, *et seq.*

Statement.

Respondents respectfully refer the Court to the facts as stated in the opinion of the Court of Appeals, which is an adequate and more accurate statement than that of petitioner.

Argument.

The decision below is correct; it accords with principles well settled by decisions of this Court, does not conflict with decisions of any other Court of Appeals, and presents no questions warranting review by this Court.

1. In view of this Court's decision in *Powell v. United Cartridge Co.*, 339 U. S. 497, there can be no doubt that aircraft, missile and electronic test equipment constitutes "goods" within the meaning of the Act. It is equally well settled that the preparation of draftings and designs for the manufacture of such "goods" is "closely related" and "directly essential to the production thereof" within the meaning of the Fair Labor Standards Act. In its most recent decision under the Act, *Mitchell v. Lublin, McGaughy & Associates*, 358 U. S. 207, this Court sustained coverage for draftsmen, fieldmen, clerks and stenographers of an architectural and consulting engineering firm engaged in preparing plans and specifications for construction projects involving instrumentalities of commerce. Draftings and designs, no less than tools and dies, are indispensable to the production of articles of advanced design and constitute an "integral part of the coordinated productive pattern of modern industrial organizations." See also *Borden Co. v. Borella*, 325 U. S. 679; *Mitchell v. Brown*, 224 F. 2d 359 (C. A. 8), certiorari denied, 350 U. S. 875.

An additional and independent ground of coverage exists by reason of the fact that the draftings and designs were sent outside the State. *Western Union Tel. Co. v. Lenroot*, 323 U. S. 490.

2. The exemption set forth in Section 13(a)(1) of the Act applies to "any employee employed in a bona fide executive, administrative, professional * * * capacity * * * (as such terms are defined and delimited by regulations of the Administrator)." The administrative Regulations defining and delimiting these terms (29 C. F. R. Secs. 541.1, 541.2, .541.3) include a "salary test" which must be met in order for an employee to fall within one of these classifications. These Regulations "have the force of law as much as though they were written in the statute" (*Helliwell v. Haberman*, 140 F. 2d 833, 834 (C. A. 2); *Fanelli v. United States Gypsum Co.*, 141 F. 2d 216 (C. A. 2)), and an employer claiming the benefit of one of these exemptions has the burden of proving the existence of each of the conditions set forth in the Regulations, including the salary requirement. *Walling v. General Industries Co.*, 330 U. S. 545, 547-548; *Helliwell v. Haberman, supra; Fanelli v. United States Gypsum Co., supra.* As the Eighth Circuit noted in *Smith v. Porter*, 143 F. 2d 292 (C. A. 8), the "precise question here is not whether the [plaintiffs] were employed in an executive capacity within the meaning the phrase may have in common usage, but whether [they] were so employed within the definition as promulgated by the administrator under authority of law." (143 F. 2d at 295). Far West's argument that these plaintiffs were exempt from the overtime provision of the Act as "executive" or "professional" employees cannot survive the trial court's finding that each plaintiff was "an

hourly employee" [Tr. 46, 47, 49-50, 51-52]. Plainly, an "hourly employee" is not compensated "on a salary or fee basis."

The Petition states (p. 5): "This Court has had occasion to deal recently with this precise problem in *Mitchell v. Lublin, McGaughy & Associates*, 358 U. S. 207."

But it is clear from Petitioner's own quotation from the *Lublin, McGaughy* opinion that the exempt or non-exempt status of the professional employees in that case was never presented to this Court for determination.

3. There is ample evidentiary support for the concurrent findings of the District Court and the Court of Appeals that thre was no guaranteed compensation agreement. (See Pet. App. 11-12). Further, petitioner did not plead or attempt to prove compliance with the specific requirements of the technical exception to the Act's overtime requirements set forth in Section 7(e).[1]

The Petition sets forth the "*Actual Approx. Average* Weekly Earnings During Supervisorial Period," which in every instance appear to be in excess of "Amount the Petition sets forth the "*Actual Approx., Average* Weekly Earnings During Supervisorial Period," which in every instance appear to be in excess of "Amount

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[1] "No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 6(a) and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified."

for 40 Hrs. 5 Hrs. Overtime (Weekly Guarantee)." Such a showing does not meet the requirements of Section 7(e). Furthermore, the payroll records [Exs. A through J] show that in numerous instances in particular weeks, the employees worked less hours and were paid for less than the so-called 45-hour guarantee.

4. The District Court, as affirmed by the Court of Appeals, found that Petitioner's violation of the Act was in "good faith." From this Petitioner urges that the Act is made inapplicable in its entirety.

Section 16(b) of the Fair Labor Standards Act of 1938 (29 U. S. C. Sec. 216(b)) provides:

> "Any employer who violates the provisions of Section 6 or Section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. * * *."

A partial and conditional relief from this liability for liquidated damages was provided for by the enactment of Section 11 of the Portal-to-Portal Act of 1947 (29 U.S.C. Sec. 260), which states:

> "* * * if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in *good faith* and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, *the court may, in its sound discretion, award no liquidated damages* or award any amount thereof not to exceed the amount specified in section 16(b) of such Act." (Italics supplied.)

The employer remain liable, of course, for the unpaid overtime compensation.

5. The District Court denied petitioner's motion to dismiss made pursuant to Fed. Rules Civ. Proc. 37(d). By its very terms Rule 37(d) is discretionary with the trial court, "the court * * * *may* * * * dismiss the action or proceeding." (Italics supplied), and the courts have so interpreted the rule. *Hubbard v. Baltimore and Ohio R.R. Co.* (6 Cir., 1957), 249 F. 2d 885; *Campbell v. Johnson* (S. D. N. Y., 1951), 101 Fed. Supp. 705. The Court of Appeals held that, under the circumstances present, the trial court had not abused its discretion.

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorneys for Respondents.